87-811

No. .....

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

EDWARD KORBEL,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

LEO FASEN, ESQ.
9911 W. Pico Blvd., Suite 800
Los Angeles, CA 90035
(213) 553-8624

ROBERT J. WATERS, ESQ.
2115 Main Street
Santa Monica, CA 90405
(213) 399-3259

Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

BEST AVAILABLE COPY

QUESTIONS PRESENTED

The questions presented by this petition are:

1. May items alleged to be drug paraphernalia be seized without valid court process under the plain view doctrine, absent a showing that the discovery of the items was inadvertent?

2. May items enclosed in glass display cases, not accessible to the public, be seized under the plain view doctrine?

3. May a search warrant issue for a retail store based on an officer's mere conclusion that items therein are drug paraphernalia without a showing that the items were marketed for use with controlled substances?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
I	
STATEMENT OF THE CASE	2
(A) Trial Court No. P011725	2
(B) Case No. P024736	4
(C) Appellate Review	4
II	
STATEMENT OF FACTS	5
(A) Case No. P011725	5
(B) Case No. P024736	6
III	
REASONS FOR GRANTING WRIT	7
CONCLUSION	16
APPENDIX	
Appendix A. Memorandum Judgment	A-1
Appendix B. Order Denying Certification	B-1
Appendix C. Order Granting Rehearing	C-1
Appendix D. Minute Order	D-1
Appendix E. Section 11014.5 Drug Paraphernalia	E-1

TABLE OF AUTHORITIES

Cases

	Page
Arizona v. Hicks, 480 U.S. ____, 107 S.Ct. 1149, 87 L.Ed.2d 347 (1987)	8, 9
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	7, 8, 9, 10, 11, 13
Emery v. Holmes, 824 F.2d 143 (1st Cir. 1987)	10
G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977)	13
Illinois v. Andreas, 463 U.S. 765 (1983)	11
In re Lance W., 37 Cal.3d 873 (1985)	3
In re Michael L., 39 Cal.3d 81 (1985)	3
Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)	13
Marcus v. Search Warrant, 367 U.S. 717 (1961)	15
North v. Superior Court, 8 Cal.3d 301 (1972)	7, 10
Perlman v. City of Chicago, 801 F.2d 262 (7th Cir. 1986), *cert. den.*, ____ U.S. ____ (1987)	10
Steele v. United States, 267 U.S. 498 (1925)	11
Tarantino v. Baker, 825 F.2d 772 (4th Cir. 1987)	10
Taylor v. United States, 286 U.S. 1 (1932)	11
Texas v. Brown, 460 U.S. 730 (1983)	7, 8, 9, 11, 12, 13
U.S. v. Beal, 810 F.2d 574 (6th Cir. 1987)	10
U.S. v. Chesher, 678 F.2d 1353 (9th Cir. 1982)	10
U.S. v. Cushnie, 488 F.2d 81 (5th Cir. 1973), *cert. den.*, 419 U.S. 968 (1974)	10
U.S. v. Fawole, 785 F.2d 1141 (4th Cir. 1986)	10
United States v. Gates, 462 U.S. 213 (1983)	3
U.S. v. Good, 780 F.2d 773 (9th Cir. 1986)	10

TABLE OF AUTHORITIES

CASES

	Page
United States v. Leon, 468 U.S. 897 (1984)	3, 4
U.S. v. Limatoc, 807 F.2d 792 (9th Cir. 1987)	10
U.S. v. Martin, 806 F.2d 204 (8th Cir. 1986)	10
U.S. v. Meyer, 827 F.2d 943 (3rd Cir. 1987)	10
U.S. v. Rivera, 825 F.2d 152 (7th Cir. 1987)	10
United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)	13
U.S. v. Santana, 485 F.2d 365 (2nd Cir. 1973), *cert. den.*, 415 U.S. 931 (1974)	10
U.S. v. Scarfo, 685 F.2d 842 (3rd Cir. 1982), *cert. den.*, 459 U.S. 1170 (1983)	10
U.S. v. Stitzer, 785 F.2d 1506 (11th Cir. 1986)	10
U.S. v. $10,000 In U.S. Currency, 780 F.2d 213 (2nd Cir. 1986)	10
U.S. v. Welsh, 446 F.2d 220 (10th Cir. 1971)	10
U.S. v. Williams, 822 F.2d 1174 (D.C. Cir. 1987)	10
Wolfenbargen v. Williams, 826 F.2d 930 (10th Cir. 1987)	10

Constitution

U.S. Constitution, Fourth Amendment 2, 4, 7, 8, 11, 12, 13

Statutes

California Health and Safety Code, Sec. 11014.5 2

California Health and Safety Code, Sec. 11014.5(a) 15

California Health and Safety Code, Sec. 11014.5(c) 14

TABLE OF AUTHORITIES

STATUTES

	Page
California Health and Safety Code, Sec. 11364.7(a)	3, 4, 5
California Penal Code, Sec. 1538.5	3
California Penal Code, Sec. 1538.5(a)	4
28 U.S.C., Sec. 1257(3)	2

Treatises

Hall, *Search and Seizure,* Bancroft Whitney Co., Sec. 3:10, p. 79 (1987 Pocket Part)	8
Judge Moyland, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle,* 26 Mercer Law Review 1047, 1096	11
1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment,* Paragraph 2.2(a), page 321-22, n.2 (2d Edition 1987)	8, 11, 12

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

EDWARD KORBEL,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Petitioner, EDWARD KORBEL, respectfully prays that a Writ of Certiorari issue to review the memorandum judgments of the Appellate Department of the Superior Court, County of Los Angeles, which affirmed the Municipal Court's denial of petitioner's motions to suppress evidence prior to his consolidated trial.

OPINIONS BELOW

The memorandum judgments of the Appellate Department of the Superior Court, County of Los Angeles, State of California, of which review are sought, are not reported and are set forth in the attached appendix. (App. A, *infra,* A-1 to A-7).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1257(3) on the ground that his rights under the Fourth Amendment to the United States Constitution were violated.

After granting petitioner's consolidated petition for rehearing, the Appellate Department of the Superior Court, County of Los Angeles, State of California, entered its order rejecting petitioner's Fourth Amendment claims on August 12, 1987, and denied petitioner's consolidated application for certification to the California Court of Appeal on September 15, 1987. (App. B, *infra*).

The instant petition for a Writ of Certiorari is filed within sixty days of that order.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

California Health and Safety Code Section 11014.5 ("drug paraphernalia") is lengthy and is therefore set forth in full in the Appendix (App. E, *infra*).

I

STATEMENT OF THE CASE

(A) Trial Court No. P011725

By Complaint No. P011725, filed February 18, 1983, petitioner was charged with a misdemeanor violation of California Health and Safety Code Section 11364.7, subdivision (a), (to deliver, furnish, or to possess with intent to deliver "drug paraphernalia") based on the seizure of items from petitioner's business known as "Auditory Odyssey," pursuant to warrant. On March 4, 1983, petitioner filed a motion to suppress evidence pursuant to California Penal Code Section 1538.5 and to traverse and quash search warrant D7920. Respondent conceded in its responding papers that the search warrant should not have been issued. On August 4, 1983, the trial court tentatively granted in part and denied in part petitioner's motion to suppress evidence and took it under submission on June 11, 1984. On September 28, 1984, the trial court vacated submission on the motion, *nunc pro tunc,* awaiting the California Supreme Court's ruling in *In re Michael L.,* 39 Cal.3d 81 (1985).

On October 3, 1985, the trial court offered to relieve respondent of the "Stipulation" that the search warrant was invalid in light of the California Supreme Court's ruling in *In re Lance W.,* 37 Cal.3d 873 (1985) and this Court's ruling in *United States v. Leon,* 468 U.S. 897 (1984) and *United States v. Gates,* 462 U.S. 213 (1983). The trial court indicated that in relieving the prosecution of its Stipulation as to the invalidity of the search warrant, he would rule under *United States v. Gates, supra,* that there was sufficient probable cause for the issuance of the search warrant. However, in fairness to petitioner, the trial court said it would allow the petitioner to reopen his motion to quash and traverse the search warrant, at

least within the parameters of *United States v. Leon, supra.* 10/3/85 R.T. 12-14. Respondent chose to let stand the trial court's prior ruling of June 11, 1984, that those items not in plain sight or improperly commingled would be suppressed. Respondent further stipulated that, as a matter of evidence, it would only present those items to the jury the trial court found were in plain sight. *Id.* p. 43-44, 59. The trial court then granted petitioner's motion to suppress those items as set forth in its ruling of June 11, 1984 (with the exception of the scales) and denied the balance of petitioner's motion. The trial court then consolidated this case with Case No. P024736. Petitioner filed his Notice of Appeal to the Appellate Department of the Superior Court on December 2, 1985.

(B) Case No. P024736

By Complaint No. P024736, filed on March 9, 1984, petitioner was again charged with California Health and Safety Code Section 11364.7, subdivision (a), based on a subsequent seizure of items from the Auditory Odyssey pursuant to Warrant. On June 29, 1984, petitioner filed his motion to suppress evidence pursuant to Penal Code Section 1538.5(a) and to traverse and quash search warrant No. E7424. Petitioner's motion to suppress evidence was denied on July 19, 1985. Petitioner filed his Notice of Appeal to the Appellate Department of the Superior Court on August 16, 1985.

(C) Appellate Review

On April 15, 1986, the Appellate Department consolidated petitioner's appeals. (App. D, *infra*). On April 14, 1987, the Appellate Department issued its memorandum judgments. On May 14, 1987, the Appellant Department granted petitioner's consolidated petition for rehearing and vacated the memorandum judgments. (App. C, *in-*

fra). On August 12, 1987, the Appellate Department filed memorandum judgments denying petitioner's Fourth Amendment claims. On September 15, 1987, the Appellate Department denied petitioner's consolidated application for certification to the California Court of Appeal.

II
STATEMENT OF FACTS

(A) Case No. P011725

Shortly after January 1, 1983, Los Angeles Police Department Officer Richard M. Lyons became aware of newly added California Health and Safety Code Section 11364.7. Thereafter, Lyons and other detectives received citizen complaints regarding continuing sales of controlled substance paraphernalia from locations commonly known as "head shops." During the week beginning February 7, 1983, Lyons visited the business known as "Auditory Odyssey," located at 6338 Laurel Canyon Boulevard, North Hollywood. His observations were set forth in the Affidavit in support of the search warrant issued February 11, 1983:

> "While within this business, open to the public, I observed hundreds of items that in my expert opinion are intended for the consumption of controlled substances. Most of these items bore price stickers."

After securing a search warrant for the premises, Lyons entered petitioner's business premises during normal business hours to serve the search warrant. 4/18/83 R.T. 20. Lyons requested to speak to the owner of the business and petitioner came out from behind the counter. Lyons handed petitioner the search warrant and placed him under arrest. *Id.*, R.T. 21; 6/10/83 R.T. 72. Lyons did not personally seize any items but left the location with petitioner. *Id.*, R.T. 21-22. Lyons testified that the basis

for the seizure of the items and the arrest of petitioner were his observations during the week of February 11, 1983. *Id.*, R.T. 40. In Officer Lyons' absence, the individual officers formed their own opinion as to which items were to be seized. *Id.*, R.T. 41. Officer Lyons admitted that during the week of February 7th or on February 11, 1983, he did not see petitioner or anyone under his direction sell any of the items, indicating or had knowledge that the items were to be used with controlled substances. *Id.*, R.T. 63. Nonetheless, Lyons arrested petitioner and it was only after his arrest that the items were seized. *Ibid.*

(B) Case No. P024736

On February 27, 1984, Los Angeles Police Officer James M. Dumelle obtained a search warrant for petitioner's business known as Auditory Odyssey at the same location. The Warrant authorized the search and seizure of the following items:

> "Controlled substance paraphernalia which has been designed for use or marketed to be used for . . . ingesting, inhaling, smoking or otherwise introducing into the human body a controlled substance."

After reciting his expertise, Dumelle's Affidavit in Support of the search warrant states that during the afternoon of February 21, 1984, he visited the "Auditory Odyssey." While inside the store, he observed hundreds of items that in his expert opinion were intended for the consumption of controlled substances, specifically marijuana, hashish, hashish oil or cocaine. Dumelle noted that these items were in plain sight and that most of these items bore price stickers and were displayed for sale.

Dumelle concluded that the business was selling controlled substance paraphernalia and the items were dis-

played for sale or sold with the knowledge or under circumstances where one reasonably should know that they would be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance. It was stipulated at the special hearing on petitioner's motion to suppress evidence that Dumelle omitted from his Affidavit the existence of signs which stated the store would not engage in any sale and any merchandising of an item if they had any indication that the item was going to be used with a controlled substance. Other signs indicated the marketing purpose of the item, *e.g.*, a water pipe for tobacco and herbs. 7/19/85 R.T. 19. After reweighing the omission with respect to the signs, the Court found probable cause for the issuance of the search warrant and found that the Warrant was not overbroad. 7/19/85 R.T. 9, 22.

III

REASONS FOR GRANTING WRIT

In dismissing petitioner's argument that the seizure of the items in his store was not "inadvertent," the Appellate Department of the Superior Court cited *North v. Superior Court,* 8 Cal.3d 301, 307-08 (1972) for the proposition that the "inadvertence" requirement articulated by the plurality opinion in *Coolidge v. New Hampshire,* 403 U.S. 443, 465-66 (1971), is not binding authority in California. The Appellate Department further stated that petitioner's reliance on *Texas v. Brown,* 460 U.S. 730, 737 (1983), "is unconvincing" in that this Court's majority opinion did not adopt the requirement of inadvertence to bring the seizure within the ambit of the "plain view" doctrine. Memorandum Judgment, p. 2. (App. A, *infra,* A-2). Petitioner contends that the *Coolidge* inadvertence requirement is constitutionally com-

pelled under the Fourth Amendment and should be specifically addressed and ruled on by this court.

In *Texas v. Brown*, *supra*, 460 U.S. at 735, this Court unanimously applied *Coolidge* to the search and seizure involved. The Court produced four opinions. The plurality [Rehnquist, J., Burger, C.J., O'Connor, J.] made the point that *Coolidge's* three part test of plain view arose from a plurality opinion which was "not a binding precedent" but "should obviously be the point of reference for further discussion of the issue," and proceeded to apply *Coolidge*, finding that the "immediate apparent" and "inadvertence" tests were satisfied. 460 U.S. 738, 742-745. While concurring with the plurality, Justice White expressed his disagreement with the inadvertence requirement. *Id.*, at 744. Two other members of the Court [Powell, Blackmun, J.J.] saw "no reason at this late date to imply criticism of [*Coolidge's*] articulation of this exception" because it "has been accepted generally for over a decade." *Id.*, at 746-47 and n.2. The remaining three justices [Stevens, Brennan, Marshall, J.J.], without addressing this point cited *Coolidge* as precedent on the plain view doctrine. *Id.*, at 750. *See* 1 W. LaFave, *Search and Seizure, a Treatise on the Fourth Amendment,* Paragraph 2.2(a), page 321-22, n.2 (2d Edition 1987). "Thus, while the plurality went out of its way to criticize the 'immediately apparent' standard of *Coolidge*, the entire Court applied *Coolidge* to sustain the search and at least five members (and maybe the entire Court) found it binding precedent." Hall, *Search and Seizure*, Bancroft Whitney Co., Section 3:10, p. 79 (1987 Pocket Part).

In *Arizona v. Hicks,* 480 U.S. ____, 107 S.Ct. 1149, 87 L.Ed.2d 347 (1987), this Court clarified the plurality's holding in *Coolidge* and decided whether the "plain view" doctrine may be invoked when police have less than probable cause to believe that the item in question is

evidence of a crime or is contraband. In *Hicks*, the majority [Scalia, Brennan, Marshall, Blackmun, and Steven, J.J.] applied *Coolidge* to the facts of the case and affirmed the Judgment of the Arizona Court of Appeals holding that probable cause was required under the "plain view" doctrine to support the seizure of evidence or contraband. While Justice White concurred in the majority opinion he observed that the case did not address the "inadvertent discovery" prong of the plain view exception to the Warrant Clause, "and I therefore do not accept the dissent's assertion that evidence seized in plain view must have been inadvertently discovered in order to satisfy the dictates of the Fourth amendment." *Id.*, 94 L.Ed.2d at 357. The dissenting opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, did apply the inadvertence requirement of *Coolidge* and found that it was satisfied in this case — "the officers did not 'know in advance the location of [certain] evidence and intend to seize it, relying on the plain view doctrine only as a pretext.' *Texas v. Brown, supra*, at 733."[1] *Id.*, 94 L.Ed.2d at 360 (quoting *Coolidge v. New Hampshire, supra*, at 420). Based on the foregoing, it is clear that the California Supreme Court's treatment of *Coolidge* in *North* as a mere plurality opinion has been significantly eroded by

---

[1]Thus, of the *Hicks* majority, at least one justice [Blackmun, J.] has previously expressed the opinion that *Coolidge* should not be modified and three [Stevens, Brennan, and Marshall, J.J.] have repeatedly cited *Coolidge* as precedent without discussion. In addition, there are the three members [O'Connor, J., Rehnquist, C.J., Powell, J.] of the *Hicks* dissent who applied the inadvertence standard, including Justice Powell who earlier expressed his opinion in *Brown* that *Coolidge* should not be modified. Together, at least seven members of the Court have cited *Coolidge* as precedent without modification and at least five members have specifically applied the inadvertence requirement to the facts before them in *Brown* and *Hicks*.

subsequent opinions of this Court. Further, *North* is in conflict with all of the federal circuits.

Although some of the circuits have noted that this court has not decided authoritatively whether the "inadvertent" requirement is an element of the plain-view doctrine,[2] all have uniformly applied the *Coolidge* "inadvertent" requirement in assessing plain view seizures. First Circuit: *Emery v. Holmes,* 824 F.2d 143, 148 & n.9 (1st Cir. 1987); Second Circuit: *U.S. v. $10,000 In U.S. Currency,* 780 F.2d 213, 218-19 (2nd Cir. 1986); *U.S. v. Santana,* 485 F.2d 365 (2nd Cir. 1973) *cert. den.* 415 U.S. 931 (1974); Third Circuit: *U.S. v. Meyer,* 827 F.2d 943, 945 (3rd Cir. 1987); *U.S. v. Scarfo,* 685 F.2d 842, 845 (3rd Cir. 1982) *cert. den.* 459 U.S. 1170 (1983); Fourth Circuit: *Tarantino v. Baker,* 825 F.2d 772, 777 & n.3 (4th Cir. 1987); *U.S. v. Fawole,* 785 F.2d 1141 (4th Cir. 1986); Fifth Circuit: *U.S. v. Cushnie,* 488 F.2d 81 (5th Cir. 1973) *cert. den.* 419 U.S. 968 (1974); Sixth Circuit: *U.S. v. Beal,* 810 F.2d 574, 577 (6th Cir. 1987); Seventh Circuit; *U.S. v. Rivera,* 825 F.2d 152, 157 (7th Cir. 1987); *Perlman v. City of Chicago,* 801 F.2d 262, 265 (7th Cir. 1986) *cert. den.* ____ U.S. ____ (1987); Eighth Circuit: *U.S. v. Martin,* 806 F.2d 204, 207 (8th Cir. 1986); Ninth Circuit: *U.S. v. Limatoc,* 807 F.2d 792, 795 (9th Cir. 1987); *U.S. v. Good,* 780 F.2d 773, 775 (9th Cir. 1986); *U.S. v. Chesher,* 678 F.2d 1353, 1356 (9th Cir. 1982); Tenth Circuit: *Wolfenbargen v. Williams,* 826 F.2d 930, 935 (10th Cir. 1987); *U.S. v. Welsh,* 446 F.2d 220, 223 (10th Cir. 1971); Eleventh Circuit: *U.S. v. Stitzer,* 785 F.2d 1506, 1517 (11th Cir. 1986); D.C. Circuit: *U.S. v. Williams,* 822 F.2d 1174, 1182 & n.82 (D.C. Cir. 1987).

---

[2]See, e.g., *Tarantino v. Baker, infra,* 825 F.2d at 772, n.3; *U.S. v. Rivera, infra,* 825 F.2d at 157; *Emery v. Holmes, infra,* 824 F.2d at 149, n.9.

The Appellate Department in this case also assumed that because the officers had a right to be in petitioner's store and viewed items they believed to be paraphernalia, they had a concomitant right to *seize* them without a warrant. This reasoning is fundamentally flawed. *See Taylor v. United States*, 286 U.S. 1 (1932) (although the police stood where they had a right to be and saw contraband in plain view in a garage, this did not justify their warrantless entry to seize the contraband). *Cf.*, *Steele v. United States*, 267 U.S. 498 (1925) (police, standing where they had a right to be, looked into a garage and saw contraband in open view through the doorway; this furnished probable cause for obtaining a warrant by which they lawfully entered and seized the contraband). As noted by LaFave in his *Treatise*, "It is equally important to understand that while the characterization of an observation as a non-search plain view situation settles the lawfulness of the observation itself, *it does not determine whether a seizure of the observed object would likewise be lawful.*" [Emphasis added.] 1 W. LaFave, *Search and Seizure, supra,* Section 2.2(a), page 323.[3]

This point was made by this Court in *Illinois v. Andreas,* 463 U.S. 765 (1983), where the Court cautioned

---

[3]As stated by Judge Moyland in his article, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle,* 26 Mercer Law Review 1047, 1096:

> "Seeing something in open view does not, of course, dispose, *ipso facto,* of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly over-apply the plain view doctrine to every situation where there is a visual open view have not learned the simple lesson long since mastered by old hands at the burlesque houses, 'you can't touch everything you can see.'
>
> "Light waves cross thresholds with a constitutional impunity not permitted arms and legs. Wherever the eye may go, the body of the policeman may not necessarily follow." Quoted by LaFave *supra,* page 324.

that the plain view doctrine "authorizes seizure of illegal or evidentiary items visible to a police officer" only if the officer's "access to the object" itself has a "Fourth Amendment justification." *Id.*, at 772. Similarly, the plurality opinion in *Brown, supra,* states that " 'plain view' provides grounds for seizure of an item *when an officer's access to an object has some prior justification under the Fourth Amendment.*" [Emphasis added.] As the plurality stated in *Coolidge:*

> "Plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absence 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

LaFave concludes his analysis with the admonition, "and even when the plainly viewed object could be seized without interfering with a person or entering upon protected premises, it cannot be said that the right of seizure flows automatically from the plain view. Except when the object has been abandoned, the seizure itself constitutes an interference with 'effects' protected by the Fourth Amendment, and this means that in the absence of a search warrant some recognized ground for warrantless seizure, equally applicable outside plain view cases, must be present." *Id.*, at 325. In this case, the items seized by the officers were enclosed in glass display cases and in other portions of the store inaccessible to the public.

This Court has repeatedly stated that plain view seizures are treated differently when the items sought are located in non-public areas. As noted by the plurality in *Brown, supra,* 460 U.S. at 738-39:

> "We recognized in *Payton v. New York,* 445 U.S. 573, 587, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980), the well settled rule that 'objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.' A different situation is presented, however, when the property in open view is ' "situated on private premises to which access is not otherwise available for the seizing officer." ' *Ibid.* quoting *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 354, 97 S.Ct. 619, 629, 50 L.Ed.2d 530 (1977). As these cases indicate, 'plain view' provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment."[4]

Accordingly, the Appellate Department's judgment would be correct if the officers had purchased the alleged

---

[4]*Brown* observes in n.4: "It is important to distinguish 'plain view,' as used in *Coolidge* to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, see *infra,* at 1542; *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion may, in some cases, see, *e.g., Terry v. Ohio, supra; United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), justify police conduct affording them access to a particular item." [Emphasis in original.]

paraphernalia or had otherwise lawfully obtained possession of the items from the store personnel. Here, however, the items were seized from the enclosed glass display cases and from behind the counter pursuant to the invalid search warrant. Therefore, the officers had no legitimate access to the items and consequently the *seizure* of the items should have been suppressed.

With respect to the second search warrant, Officer Dumelle did not specifically describe in his Affidavit any of the items he observed. *Nor did he aver that any of the observed items were advertised, offered for sale, displayed for sale, or sold in any manner which promoted the use of any of the items, products, or materials with controlled substances.* All the magistrate was left with was his conclusion that the items could be used with controlled substances. Furthermore, Dumelle did not indicate any other factors except his mere "expert" opinion as to whether an object fell within the definition of "drug paraphernalia." He did not indicate any statements by an owner or anyone else in control of the object concerning its use. No instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body were described in the Affidavit. Dumelle failed to note if any descriptive materials accompanied the object which explained or depict its use, any national or local advertising concerning its use, the manner in which the object was displayed for sale, or whether the owner or anyone in control of the object was a legitimate supplier of like or related items to the community such as a licensed distributor or dealer of tobacco products. See California Health and Safety Code Section 11014.5(c).

The Affidavit makes no effort to describe the physical features of the items which Dumelle purportedly saw which led him to his conclusions. As noted in the memo-

randum judgment of the Appellate Department, "[i]n describing the items to be seized Dumelle repeated the language of Health and Safety Code Section 11014.5 subdivision (a), which defines 'drug paraphernalia.'" (App. A, *infra*, A-5) No information was provided to the magistrate to substantiate the officer's conclusions that the items he observed came within the definition of "drug paraphernalia." All Dumelle has done in his Affidavit is to state his conclusionary allegations in conjunction with the statutory definitions of the items listed in the statute.

Clearly, before a finding as to the nature of an item can be made, the item must be described. The showing made in the Affidavit in this case is equivalent to an affidavit seeking seizure of a film as "obscene," based solely on a police officer's allegation he had seen the film and "it is obscene." Such a showing would clearly be inadequate. *See*, e.g., *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961) invalidating seizure of allegedly obscene books on the authority of a warrant "issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." It is simply not enough that Dumelle knows drug paraphernalia when he sees it. Here, there was simply no factual basis for a magistrate to determine the nature of the items sought to be seized. Since searches of retail stores for alleged drug paraphernalia are likely to reoccur throughout the States, based on such statutes and perfunctory affidavits, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the instant Writ be granted.

November 12, 1987

Respectfully submitted,

LEO FASEN and
ROBERT J. WATERS

By: LEO FASEN
Attorneys for Petitioner

APPENDIX A

MEMORANDUM JUDGMENT

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT, STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

EDWARD KORBEL,
Defendant and Defendant.

Superior Ct. No. CR A23905
Municipal Court of the Los Angeles Judicial Dist.
No. P011725

Filed: August 12, 1987
Frank S. Zolin, County Clerk
By Alan Hardey, Deputy

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:[1]

First, defendant contends that the court impermissibly allowed the prosecution to justify the seizure of various items on the basis of the "plain view" doctrine although

---

[1]After carefully examining defendant's petition for rehearing of defendant pertaining to the above-captioned matter, we have determined that none of petitioner's contentions are meritorious. We particularly note that *Arizona v. Hicks* (1987) ____ U.S. ____, 107 S.Ct. 1149 is inapplicable to the case at bench on its facts. Accordingly, our original opinion is being refiled without change.

the officers had initially entered and seized said items on the basis of a warrant, which the People had stipulated was invalid. We do not agree.

We first address the question whether the officers were lawfully at the viewing place so as to employ the doctrine. The officers entered the Auditory Odyssey, a business open to the public, during business hours. As any members of the public, they had a right to be in the shop.

Defendant argues that the officers knew, prior to their entry, that the items seized were on display. Therefore, he contends when they entered, the discovery of the evidence was not inadvertent, as required by the "plain view" doctrine. In support of this argument defendant relies on *Coolidge v. New Hampshire* (1971) 403 U.S. 443. However, our Supreme Court, in *North v. Superior Court* (1972) 8 Cal.3d 301, 307-308, announced that *Coolidge* was a plurality opinion not binding in California. The Court declined to apply the *Coolidge* decision's rationale that a "plain view" seizure must be inadvertent. Defendant's reliance on *Texas v. Brown* (1983) 460 U.S. 730, 737, is unconvincing. That case does not express a majority opinion regarding a requirement of inadvertence in order to bring a seizure within the ambit of the "plain view" doctrine, as defendant suggests. Therefore, we conclude that inadvertence of discovery, as discussed in *Coolidge* is not binding on this court.

This court, in *People v. Clark-Van Brunt* (1984) 158 Cal.App.3d Supp. 8, was faced with facts similar to those in the case at bench. In *Clark-Van Brunt* the People sought to justify the seizure of purported drug paraphernalia as a seizure of contraband in plain view rather than under the search warrant that had been issued. We found that evidence in plain view, seized by an officer who is in a place he has a right to be, is admissible in evidence. In so finding, we implicitly found that the evidence was not

suppressible merely because the officers entered the premises with the intent to execute a search warrant. In the present case, we find that the seizure of those items in the officer's plain view was constitutionally proper.

Defendant further contends that there was insufficient probable cause to believe the items seized were drug paraphernalia within the meaning of Health and Safety Code section 11014.5. Again, we disagree.

Defendant is correct in his claim that the People must prove a nexus between the items seized and the criminal activity proscribed by the statute in order to justify the seizure. Section 11014.5(c) provides a nonexhaustive list of factors to be considered in determining whether an object is drug paraphernalia, *in addition to all other logically relevant factors.* Officers Lyons and Ray, after having established their expertise and experience in the investigation of narcotics, testified as to their belief that the items were drug paraphernalia, thus establishing the requisite nexus. While many of the items, when taken individually, may have dual purposes, in aggregate, they had one common use — as drug paraphernalia. Based on their experience and the nature of the items sold, the officers had ample reason to believe that the items were sold as drug paraphernalia.

The court's order denying defendant's motion to quash the search warrant and suppress evidence is affirmed.

[ILLEGIBLE]
Presiding Judge

I concur.

NEWMAN
Judge

MEMORANDUM JUDGMENT

APPELLATE DEPARTMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

EDWARD KORBEL,
Defendant and Appellant.

Superior Ct. No. CR A23733
Municipal Court of the Los Angeles Judicial Dist.
No. P 024736

Filed: August 12, 1987
Frank S. Zolin, County Clerk
By Alan Hardey, Deputy

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

Defendant contends, with regard to the search warrant in the above case, that the warrant was improperly issued as it was not supported by probable cause. He assigns as a deficiency that Officer Dumelle, the affiant, failed to "... physically describe ... any of the items that he observed," nor did he "aver that any of the items were advertised, offered for sale, displayed for sale, or sold in any manner which promoted the use of any of the items, products, or materials with controlled substances." The contention is without merit.

The standard by which a magistrate must determine the existence of probable cause for the issuance of a search warrant was explained in *Illinois v. Gates* (1983) 462 U.S. 213. The Supreme Court emphasized that the magistrate's determination of probable cause should be

paid great deference and that reviewing courts should use a common sense rather than hypertechnical analysis. (*Id.*, at p. 236.) What is required is a showing of probability — rather than a prima facie showing — of criminal activity, to support a finding of probable cause to issue the warrant. All that is needed is that the magistrate have a substantial basis for concluding that a search would uncover evidence of wrongdoing.

Applying the foregoing standards to the instant case, we find that the magistrate's finding of probable cause, as well as the lower court's review thereof, was correct. The affiant, Officer Dumelle established his extensive expertise in the area of investigating drug-related offenses, which included a familiarity with the devices and apparatus used in the preparation and ingestion of drugs. Officer Dumelle then described in detail numerous items at the shop which are commonly used in the consumption of controlled substances. Dumelle further advised the magistrate that the items were to be found in a business open to the public, and were on display in plain view bearing price stickers. In describing the items to be seized Dumelle repeated the language of Health and Safety Code section 11014.5 subdivision (a), which defines "drug paraphernalia." Dumelle's description of the items observed at the shop indicated his working knowledge of what constitutes drug paraphernalia. On this recitation of facts, the affidavit provided the magistrate with a substantial basis for issuing the warrant.

In addition, defendant asserts that since the affidavit failed to include either statements by the owner or person in control that the items were drug paraphernalia or show that the items bore instructions concerning their use with controlled substances, that there was insufficient probable cause to believe that defendant possessed drug paraphernalia with the requisite intent.

In *Casbah, Inc. v. Thone* (8th Cir. 1981) 651 F.2d 551, 561, the court, relying on "the cogent reasoning of Judge Stapleton in *Delaware Accessories Trade Association v. Gebelein,* . . . . [determined that] [e]ssentially . . . a seller must have already intended that the item be sold for drug use before his knowledge of its use by a buyer comes into play. (Citations.) In these circumstances it is not improper that the seller be required to open his eyes to the objective realities of the sale." As was stated in *Garner v. White* (8th Cir. 1984) 726 F.2d 1274, 1282 fn. 8, ". . . [t]he intent of the manufacturer or designer is embodied in the object itself and is apparent to all who perceive it. All that is required is for persons to open their eyes to the 'objective realities' of the items sold in their businesses . . . ."

As the trial court in this case at bench correctly noted, the presence of the signs in defendant's store disclaiming defendant's intent to violate Health and Safety Code section 11364.7 may be construed as evidence that defendant was alert to the "objective realities" of the items sold in his store.

Defendant contended in his petition for rehearing filed on April 28, 1987, that this court had neglected to rule on an issue raised by appellant — namely, that the search warrant issued in case number P024736 (CR A 23733) was overbroad. In the interests of a complete disposition of this matter we granted a rehearing on May 14, 1987, relative to this contention.

Specifically, defendant contended that the warrant in case number P024736 was impermissibly overbroad in that "executing officers were directed to seize all 'drug paraphernalia, including *but not limited to*' certain listed items." This language, defendant argues, allows the police officer "to make his own probable cause determination as to which items fall within the definition while executing

the warrant, and to seize *whatever* items he considered to be 'drug paraphernalia'." Defendant misstates the record as will be seen by an examination of the search warrant.[1]

The "including but not limited to" language in the search warrant issued in case number P024736 referred *only* to items tending to show dominion and control of the premises — to which defendant does not object — and *had no application whatsoever to drug paraphernalia* subject to seizure under the warrant.

We find no merit to any other contentions raised by appellant.

The order denying defendant's motion to quash the search warrant and suppress evidence is affirmed.

[ILLEGIBLE]
Presiding Judge

I concur.

NEWMAN
Judge

---

[1]The search warrant issued in case number P024736 on February 27, 1984, as warrant number E 7424, authorized a search of defendant's business premises for the following: "Controlled substance paraphernalia which has been designed for use or marketed to be used for, planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, smoking or otherwise introducing into the human body a controlled substance. *Also including but not limited to personal telephone books, address books, telephone bills, papers and documents containing lists of names and articles of personal property tending to establish the identity of persons in control of the premises.*" (Emphasis added.)

APPENDIX B

APPELLATE DEPARTMENT OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

VS.

EDWARD KORBEL,
Defendant and Appellant.

Superior Ct. No. CR A23733
CR A23905

Municipal Court of the Los Angeles Judicial Dist.
No. P 024736 - P 011725

ORDER DENYING CERTIFICATION

Filed: Sept. 5, 1987 Frank S. Zolin, County Clerk,
by Alan Hardey, Deputy

THE COURT*

The petition of appellant for certification to the Court of Appeal having been filed and having been duly considered,

Said petition is hereby denied.

COOPERMAN
REESE
NEWMAN

---

*Before Cooperman, P.J., Reese, J., and Newman, J.

APPENDIX C

APPELLATE DEPARTMENT OF THE SUPERIOR COURT STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

EDWARD KORBEL,
Defendant and Appellant.

Superior Ct. No. CR A23733
CR A23905

Municipal Court of the Los Angeles Judicial Dist.
No. P 024736 - P 011725

ORDER GRANTING REHEARING

Filed: May 14, 1987 Frank S. Zolin, County Clerk,
by Alan Hardey, Deputy

THE COURT*

The petition of defendant for a rehearing in the above-entitled matters is granted. Pursuant to the provisions of the California Rules of Court, rule 107(c), the Memorandum Judgment filed April 14, 1987, is vacated, and the cause is submitted for decision on the previously filed briefs, argument and points and authorities contained in the Petition for Rehearing.

COOPERMAN
REESE
NEWMAN

---

*Before Cooperman, P.J., Reese, J., and Newman, J.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

APPELLATE DEPARTMENT

CR A 23733 (M.C. No. P 024736)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,

VS.

EDWARD KORBEL,
Defendant/Appellant.

Date: April 15, 1986

The Honorable Barnet M. Cooperman and
James N. Reese, Judges.

B. J. Schneider, Deputy Clerk
Carolyn Phelps, Reporter

Counsel for Plaintiff/Respondent:
James K. Hahn, City Attorney;
Roberta Scharlin Zinman, Deputy;
Jessica Silvers, Deputy

Counsel for Defendant/Appellant: Leo Fasen

Nature of Proceedings:

CR A 23905 (M.C. No. P 011725)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,

VS.

EDWARD KORBEL,
Defendant/Appellant

1) PETITION OF APPELLANT FOR WRIT OF SUPERSEDEAS/PROHIBITION/ STAY OF CONSOLIDATED TRIAL PENDING APPEALS

2) MOTION OF APPELLANT FOR CONSOLIDATION OF APPEALS AND FOR EXTENSION OF TIME TO FILE APPELLANT'S OPENING BRIEF

3) MOTION OF RESPONDENT TO DISMISS APPEAL (#CR A 23733) PURSUANT TO PENAL CODE SECTION 1510

The matters come before the court, are orally argued, and are taken under submission.

LATER, the Court rules as follows:

1) GRANTED: Trial of the defendant/appellant in the Municipal Court of the Los Angeles Judicial District in its cases nos. P 024736 and P 011725 is stayed pending determination of these appeals.

2) GRANTED: Appeals nos. CR A 23733 and CR A 23905 are consolidated. The time for filing briefs is vacated. Briefing dates will be reset upon further order of this court.

3) DENIED.

Copies of this minute order are transmitted this date, addressed as follows: Leo Fasen, 9911 West Pico Blvd., Suite 800, Los Angeles, CA 90035;
Presiding Judge, Los Angeles Municipal Court, 110 N. Grand Ave., Los Angeles, CA 90012;
City Attorney, Appellate Division, 1600 City Hall East, Los Angeles, CA 90012.

Minutes entered by County Clerk: 4/15/86

APPENDIX E

§ 11014.5. "Drug paraphernalia"

(a) "Drug paraphernalia" means all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division. It includes, but is not limited to:

(1) Kits designed for use or marketed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits designed for use or marketed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices designed for use or marketed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment designed for use or marketed for use in identifying, or in analyzing the strength, effectiveness, or purity of controlled substances.

(5) Scales and balances designed for use or marketed for use in weighing or measuring controlled substances.

(6) Containers and other objects designed for use or marketed for use in storing or concealing controlled substances.

(7) Hypodermic syringes, needles, and other objects designed for use or marketed for use in parenterally injecting controlled substances into the human body.

(8) Objects designed for use or marketed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(A) Carburetion tubes and devices.

(B) Smoking and carburetion masks.

(C) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand.

(D) Miniature cocaine spoons, and cocaine vials.

(E) Chamber pipes.

(F) Carburetor pipes.

(G) Electric pipes.

(H) Air-driven pipes.

(I) Chillums.

(J) Bongs.

(K) Ice pipes or chillers.

(b) For the purposes of this section, the phrase "marketed for use" means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.

(c) In determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use.

(2) Instruction, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

(3) Descriptive materials accompanying the object which explain or depict its use.

(4) National and local advertising concerning its use.

(5) The manner in which the object is displayed for sale.

(6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

(7) Expert testimony concerning its use.

(d) If any provision of this section or the application thereof to any person or circumstance is held invalid, it is the intent of the Legislature that the invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application and to this end the provisions of this section are severable. [Stats 1982 ch 1278 § 1.]

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 13, 1987, I served the within Petition for a Writ of Certiorari in re: "Edward Korbel vs. State of California" in the United States Supreme Court, October Term, 1987, No. .....;

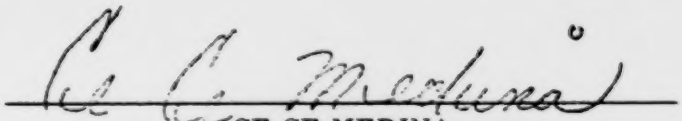
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

James K. Hahn
Los Angeles City Attorney
1600 City Hall East
200 N. Main Street
Los Angeles, California 90012

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 13, 1987, at Los Angeles, California



CE CE MEDINA